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Supreme Court, U.S.
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In The
Supreme Court
of the
United States

MITSUE TAKAHASHI
Petitioner,
vs.
LAW OFFICE OF BRIAN K. ROSS
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is it a violation of due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and a violation of public policy for trial courts to permit a contracting law firm to withdraw from a litigant's representation on the eve of trial based on the purported disability of one lawyer without requiring the firm to provide substitute representation?

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JURISDICTIONAL GROUNDS FOR PETITION

This Petition for Writ of Certiorari seeks review of a denial of review by the Supreme Court of the State of California on February 16, 2005 [1] (Appendix p. 1.13) following a denial of rehearing by the Court of Appeal of the State of California on November 23, 2004 (Appendix p. 1.12) of an unpublished decision of the Court of Appeal of the State of California filed November 3, 2004. (Appendix p. 1.1)

This Petition is proper and timely and within the jurisdiction of this Court pursuant to the United States Constitution, Article III, Section 2, Clause 1 and Rules of the Supreme Court of the United States, Rule 13.1 and 28 U.S.C. 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment V provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ." The United States Constitution, Amendment XIV provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .."

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Mitsue Takahashi v. Law Office of Brian K. Ross, (2004) Court of Appeal of the State of California, Case numbers F043912 & F044464. The Court of Appeal of the State of California's opinion and subsequent order denying rehearing and the order denying review by the Supreme Court of California are reproduced in the Appendix hereto. Specific page references to these documents will be designated as "1.1," "1.2," and so on.

STATEMENT OF THE CASE

On February 25, 2000, Petitioner entered into a written Attorney-Client Fee Contract with The Law Office of Jonathan A. Carlson ("the Carlson firm".) That Contract provided, among other things, that the Carlson firm would provide a "Scope of Services" to plaintiff in an action against the Law Offices of Brian Ross ("defendant" or "the Ross firm"), through trial, and through the entire appellate process.[2] The Contract provided for the payment of an initial non-refundable fee of $5,000, and several additional $5,000 deposits due on designated dates. The Contract provided that these deposits totaling $15,000 would provide plaintiff with 100 hours of legal services. After completion of the first 100 hours of work,

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Specifically, the Fee Contract provides that the scope of representation would include the Ross firm's pending Small Claims action against Takahashi, as well as "the preparation for, filing, and conducting of an action in the Merced County Superior Court in a matter to be entitled Takahashi v. Ross as well as the preparation of any appellate documents, including any and all appeals, writs, and/or petitions to be filed before the Court of Appeal of the State of California, Fifth Appellate District, or any appeals, writs and/or petitions before the California Supreme Court and the U.S. Supreme Court in the matter of Takahashi v. Ross, including any motions and/or petitions for rehearing or reconsideration. This agreement includes the preparation of any and all trial documents in the Small Claims appeal as well as in the Superior Court action and any appellate documents described above as well as preparation of any other findings requested or required by any court or deemed to be appropriate by me as well as appearing for any oral argument requested or required by any court in person, or via telephone., . . ." The Contract provided that the legal services described would be performed "in the soonest possible time frame."

The Contract also provided: "You may discharge me at any time. I may withdraw with your consent or for good cause. Good cause includes your breach of this agreement, your refusal to follow my advise on a material matter or any fact or circumstances that would render my continuing representation unlawful or unethical."

plaintiff would be billed for additional hourly fees to be paid at a rate of $150 per hour. Pursuant to the Contract, all fees and costs would not exceed the specified maximum of $25,000. Petitioner paid all required deposits on time and there is no allegation that petitioner has failed to perform any of the duties required of her under the terms of the Attorney-Client Contract.

The Carlson firm filed the Complaint alleging causes of action against the Ross firm for Breach of Contract, Declaratory Relief, Negligence, Breach of Fiduciary Duty, and Negligent Infliction of Emotional Distress in this action on April 13, 2000. On December 14, 2001, defendant's motion for summary judgment was denied except as to the emotional distress cause of action. Six depositions originally set for April 15, 2002 were postponed to March and April 2003. Trial in this action was initially set for January 15, 2002, then postponed to September 24, 2002, then to January 14, 2003, then to September 9, 2003, then moved backwards to April 22, 2003.

On January 21, 2003, over three and a half years after commencing the representation and three years after the signing of the Fee Contract, plaintiff received the first and only invoice she ever received from the Carlson firm. This invoice showed that plaintiff had timely paid all the required "installment" payments totaling $15,000 and that there was a balance of $10,779.44 due (including costs) based on subsequent hourly billing at the agreed $150 per hour rate, an amount which the plaintiff stood ready, willing and able to pay. Since the written Fee Contract provided that the total fees and costs were capped at $25,000, as of the January 2003 billing statement, the Carlson firm had billed all it could bill under the Contract and all additional work to be performed under the Contract (the pending discovery, trial and any necessary appeals) would have to be completed at no additional cost to the client.

This, however, was not to be. On February 14, 2003, just after completing all the work for which the firm could be paid under the written Fee Contract, with the trial date and six depositions scheduled in the next few weeks, the Carlson firm abruptly filed a Notice of Motion and Motion to be Relieved as Counsel. The motion was filed on behalf of both the employee, Jonathan Carlson individually and the Carlson firm. In support of the motion only a short Declaration by Jonathan Carlson was filed. The declaration asserted that Jonathan Carlson was the only lawyer hired by the Law Office of Jonathan Carlson, and he had been diagnosed with a branch retinal vein occlusion that resulted in the loss of a significant portion of the vision in his right eye. The cause of the condition was still to be determined and due to this uncertainty, he had been advised by his physician to significantly reduce his work hours each day. Because of this, Carlson stated, he could not continue to work on plaintiff's case.

Plaintiff filed a lengthy declaration in opposition to the motion explaining that she had performed all terms required of her under the Attorney-Client Fee Contract, that multiple important depositions which had been originally set over a year earlier, were scheduled to take place over the upcoming few weeks, that the trial (originally set for January 2002 and rescheduled multiple times thereafter), was set to begin on April 22, 2003, that the Carlson firm had been working on the case for three-and-a-half years (since August 1999, six months prior to the signing of the Attorney-Client Fee Contract) and was intimately familiar with the facts of the case, the firm had contracted to represent her through all appeals, that she was unable to represent herself and would be unable to find replacement counsel to adequately represent her during discovery and at trial. Plaintiff declared that she had never seen Mr. Carlson with any eye protection or other indication of an eye problem and that his office continued to advise her that he

was in depositions, trials, meetings and doing research, indicating that he had not reduced his workload. She pointed out that even if he were required to reduce his workload, the reduction should be as to other, more recently retained cases, not her case, which had been pending for three-and-a-half years and was at a critical juncture. Plaintiff requested that Carlson be required to be examined by eye specialists and/or that the firm obtain the assistance of another lawyer to assist him so as to allow him to meet the firm's contractual obligation to represent the plaintiff through trial and appeal.

Despite the plaintiff's well-reasoned and respectful plea that her counsel not be permitted to withdraw from the representation and thereby breach its professional, contractual and fiduciary obligations to her, on February 20, 2002, at a chambers conference, the court granted the motion, allowing both Jonathan Carlson and the Carlson firm to withdraw.

Plaintiff filed a Petition for Writ of Mandate seeking an order from the appellate court vacating the order allowing the Carlson firm to withdraw and breach its obligations, and seeking a declaration that the Carlson firm was obligated to complete the legal services which it had contracted and been paid to complete. The writ petition was denied on April 21, 2003, with a notation by the court indicating that plaintiff could seek a continuance of the trial from the Superior Court.

Plaintiff appeared at court on the scheduled trial date of April 22, 2003. She repeatedly attempted to make clear her position that notwithstanding the purported partial disability of an individual employee, the Carlson firm was contractually obligated to represent her or provide representation and services. However, the court did not respond to her argument other than to grant a continuance of the trial date.

Eventually the Ross matter was called for trial on August 5, 2003. Plaintiff appeared on her own behalf. Attorney Brian K. Ross appeared on behalf of the defendant Ross firm. Plaintiff made a statement to the court, explaining the history of

the case including the fact that she was unrepresented and utterly inexperienced in legal matters and her position that the Carlson firm was contractually bound to complete the legal services contracted for. In response to the court's inquiry, plaintiff indicated that since the Carlson firm had withdrawn in breach of its obligations, she had spoken to perhaps eight or ten lawyers, all of whom declined to represent her given the dispute regarding the Carlson firm's obligations. Plaintiff advised the court, in response to its inquiry, that she was not represented, not prepared to go to trial and she was requesting a continuance. The court denied the request and indicated that if the plaintiff were not ready to proceed immediately, he would dismiss her case, to which she responded, "I guess I'm ready if I have to." The court then began to explain to her that they would pick a jury and asked if she had witnesses to call "today and tomorrow."

Immediately thereafter, however, after listening to argument by defense counsel, the court declared that it was dismissing plaintiff's case against the defendant in its entirety on two grounds: (1) there was no record that the plaintiff had paid jury fees and (2) plaintiff did not have an expert witness as to professional liability.

In its Opinion dated November 3, 2004, the Fifth Appellate District found both of the grounds for dismissal to be invalid and remanded the matter for a new trial (Appendix, pp. 1.8-1.10) but affirmed the trial court's order allowing Carlson and his firm to withdraw.

Plaintiff filed a Petition for Rehearing with the Court of Appeal which was denied on November 23, 2004. (Appendix, p. 1.12.)

Plaintiff filed a Petition for Review with the California Supreme Court which was denied on February 16, 2005. (Appendix, p. 1.13.)

ARGUMENT

I. IT IS A VIOLATION OF DUE PROCESS OF LAW AND PUBLIC POLICY FOR A COURT TO PERMIT THE WITHDRAWAL OF A CONTRACTING LAW FIRM ON THE EVE OF TRIAL DUE TO THE DISABILITY OF A SINGLE LAWYER, THEREBY JUDICIALLY SANCTIONING THE FIRM'S BREACHES OF CONTRACT AND BREACHES OF FIDUCIARY DUTY TO THE CLIENT

A. As a matter of public policy and due process, if a law firm contracts to perform specified legal services under a flat-rate fee contract and the individual lawyer assigned to handle the case is unable to complete that representation, the firm should be required to provide experienced and "up to speed" substitute or associate counsel to complete the contract at no additional expense to the client

The Attorney-Client Fee Contract entered into between the plaintiff and the Carlson firm bore the heading "Law Office of Jonathan A. Carlson." The Contract was signed "Law Office of Jonathan Carlson [by] Jonathan A. Carlson." The Complaint prepared and filed against the Ross firm by the Carlson firm bore the name of the firm, "Law Office of Jonathan A. Carlson" on the caption. The Substitution of Attorneys filed on April 13, 2000 indicates that plaintiff's attorney of record would be "the Law Office of Jonathan A. Carlson". Similarly the one and only billing statement provided to the plaintiff bore the heading "Law Office of Jonathan A. Carlson." Thus, it is apparent that

plaintiff's Contract, which specified a maximum cap on fees for representation in the Ross matter through all appeals, was a contract with "the Law Office of Jonathan A. Carlson", not merely with a particular individual. It follows that the partial incapacity of an individual employee does not render void the Attorney-Fee Contract with a separate entity, the Law Office of Jonathan Carlson. Therefore, even assuming *arguendo*, that Carlson individually, demonstrated good cause to withdraw, that good cause for withdrawal by Carlson, the individual, does not extend to the Carlson firm, a different entity altogether.

Carlson would undoubtedly argue that he is a sole practitioner, and therefore his individual incapacity extends equally to his firm. The argument should be rejected. The "Law Office of Jonathan Carlson" contracted to provide representation to plaintiff through the trial and appeal process and to perform those services within "the soonest possible time frame"; it agreed to do so in exchange for fees and costs not to exceed $25,000; it demanded and received the plaintiff's non-refundable fee payments. It should, therefore, be bound to complete its obligations under the Contract. If it comes to pass that the attorney assigned by the firm to meet its obligations under the contract is unable to complete those duties, it is incumbent upon the firm, as the contracting entity, to provide replacement or associate counsel to fulfill its contractual, professional and fiduciary obligations.

Therefore, even assuming that the court appropriately permitted the withdrawal of the employee individually, the trial court erred as a matter of law and policy in also permitting the withdrawal of the firm, which demonstrated no cause whatsoever for its request to withdraw, effectively allowing the firm to breach its contractual and fiduciary obligations to its client. Conversely, neither Carlson nor the firm presented any argument in response to plaintiff's written objections to their request to withdraw demonstrating why another attorney could

not have been assigned or associated in to assist Carlson or take over the case from Carlson at no additional cost to plaintiff.

Again, assuming that Carlson's claimed partial disability is true, there is no reason in law or logic that plaintiff should bear the burden of his medical problem. The concept is analogous to the doctrine of *respondeat superior* which holds an employer liable for the torts of the employee:

> '[T]he modern justification for vicarious liability is ***a rule of policy, a deliberate allocation of a risk***. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise which will, on the basis of past experience, involve harm to others through the torts of employees, and sought to profit by it, it is just that he, ***rather than the innocent injured plaintiff***, should bear them; and because ***he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large***.' (Prosser, Law of Torts (3d ed. 1964) p. 471; fns. omitted.) Dean Prosser's citations suggest that the 'modern' justification has been accepted for more than 50 years. Another leading authority also points out that the modern and proper basis of vicarious liability of

> the master is not his control or fault but the risks incident to his enterprise. 'We are not here looking for the master's fault but rather for ***risks that may fairly be regarded as typical of or broadly incidental to the enterprise he has undertaken***. Further, we are not looking for that which can and should reasonably be avoided, but with the more or less inevitable toll of a lawful enterprise.' (2 Harper and James, The Law of Torts (1956) pp. 1376--1377; see also United States v. Romitti (9th Cir. 1966) 363 F.2d 662, 666 (applying California law).) Hinman v. Westinghouse Elec. Co. (1970) 2 Cal.3d 956, 959.) [emph. added.]

The same public policy rationale should be applied here. Although Carlson's disability is not a "tort" it did, in fact, cause harm to plaintiff, an innocent party, and the harm caused by that disability is clearly of the type that could have been minimized or avoided, and better absorbed, by Carlson himself or the firm. Obviously plaintiff had no control over Carlson's medical condition (indeed, she had no knowledge of it prior to the motion to withdraw), nor did she have any power to take steps to minimize or otherwise avoid the problem. On the other hand, Carlson and the firm did have some control over the situation. The firm could have and in fact may have purchased insurance to protect it from business losses based on the disability of its employees or principles. Carlson and the firm could have had should have reduced or reallocated Carlson's work load as to other, more recent and less time-sensitive cases, rather than breaching their obligations to a client whose case was at a critical juncture after three and a half years of

litigation, despite their promise to prosecute the case in the "soonest possible time frame." Carlson and the firm could have withdrawn from other cases with different fee structures, for example, cases billed strictly at hourly rates rather than this one, in which they and the client had negotiated a maximum fee exposure.

In short, public policy and the long-established principle of allocation of risk demands that in a case such as this one, where a law firm contracts with a client to complete specified services for a specified maximum fee, and the individual employee assigned to perform those services becomes partially disabled, the firm must be required to provide replacement or associate counsel to fulfill its contractual obligations to the client.

The appellate court concluded that even assuming that it agreed that Carlson and the firm should have borne the loss associated with Carlson's disability rather than the innocent client, the plaintiff's remedy must be sought by a breach of contract action against Carlson and his firm. That approach is error in light of the fact that the withdrawal of Carlson and the breaches of the firm's contractual and fiduciary obligations would not and could not have occurred without the approval of the Superior Court and probably cannot be remedied via a lawsuit ***because of*** the approval of the Superior Court.

Code of Civil Procedure section 284 provides that an attorney may be changed "(1) Upon the consent of both client and attorney, filed with the clerk, or entered upon the minutes; (2) Upon the order of the court, upon the application of either client or attorney, after notice from one to the other." The declarations of Mr. Carlson and Mrs. Takahashi both make it clear that the client did not consent to any "change" of attorney. Indeed, she vehemently opposed the withdrawal request. (AA 12, 14-20.) Therefore, withdrawal of and the breaches by the

Carlson firm could only have been effectuated by an order of the Superior Court allowing such withdrawal. Under the circumstances presented here, where plaintiff's contract was with the firm for a flat-rate fee, where the losses associated with Carlson's disability could have been avoided, reduced or absorbed by the firm, and where the plaintiff was entirely innocent of any conduct which contributed to the problem and powerless to avoid it, the court, as a matter of law and policy, should have denied the request of the Carlson firm to withdraw (and thereby breach its obligations to the client).

As it stands, the scenario can be summarized as follows: a law firm promises a scope of representation through trial and all appeals, agrees in writing to a maximum cap on fees and costs, defers most significant work on case as long as possible, exhausts fees at the hourly billing rate, as soon as fees are exhausted, one attorney develops a mysterious, previously unmanifested illness and both the attorney and the firm seek to withdraw just before critical discovery and trial is to commence.

Clearly, the Carlson firm's dealings with its client can only be described as disgraceful, a flagrant breach of the professional, contractual and fiduciary duty between a law firm and its client. But as disreputable as the conduct was, this Court might be tempted, as the Court of Appeal was, to minimize its significance, chalking it up to the bad behavior of a single person or firm, direct the plaintiff to take up her cause in a lawsuit against the firm and send her on her way. This approach might be appropriate were it not for the fact that the Carlson firm could never have succeeded in its "take the money and run" scam if the Superior Court had not permitted the shameless conduct by approving and allowing the firm's withdrawal, effectively condoning the conduct and judicially sanctioning an egregious, intentional breach of contract and professional and fiduciary duties to its client. And significantly, the court's order permitting the withdrawal effectively shuts the

door on plaintiff's ability to prevail in any subsequent breach of contract or breach of fiduciary duty action against Carlson and the firm, since the court's order will undoubtedly be viewed as 'good cause' for the withdrawal.[3]

Moreover, plaintiff's loss as a result of the order permitting the withdrawal is not limited merely to the monetary value of the contract which was not performed. She also lost, as a direct result of the order permitting the withdrawal, her right to her day in court, with representation, in her action against the Ross firm and her Constitutional right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by Article One of the California Constitution. On remand plaintiff will fare no better than she did at the first trial unless the Carlson firm is required to provide her with counsel pursuant to the terms of its contract. Thus, the prejudice to plaintiff as a result of the court's ill-advised order permitting the withdrawal, is extreme and unconstitutional. Under these circumstances, the Superior Court's order permitting the withdrawal constitutes a denial of due process, a serious abuse of discretion and a horrific miscarriage of justice.

In the legal profession, as in all professions, there will always be an unscrupulous minority who blacken the eye of the profession. Bad lawyers will occasionally lie to their clients with fraudulent intent, steal from them, and negligently handle their cases. But this type of misconduct, by and large, occurs outside of the courtroom, with neither the knowledge or the approval of the courts. In such cases, a client may sue the

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Of course, the petitioner does not in any way concede that the court's order permitting the withdrawal is a valid defense to any future action against Carlson and the firm, and she reserves the right to argue that it does not constitute a valid defense.

offending lawyers or file a complaint with the State Bar seeking restitution and appropriate discipline.

Here, in contrast, the misconduct of the Carlson firm and its abandonment of its client at a critical juncture of her case, would not and could not have occurred without the Superior Court's order allowing the unlawful and unethical abandonment. The withdrawal and breaches of the Carlson firm could only be effectuated by an order of the Superior Court allowing such abuse of process. Under the circumstances presented here, with critical discovery and trial, which should occurred more than a year before, just a few weeks away, and where it was apparent that the firm sought withdrawal only and immediately after it had exhausted its right to additional fees without having performed significant substantive work on the case, the Superior Court's granting of permission to withdraw and its condonation of the firm's breaches, can only be viewed as a denial of due process, an abuse of discretion and a manifest injustice.

B. Plaintiff does not seek to litigate her contractual rights, but rather contends that the trial court erred as a matter of law and policy in allowing the *firm* to withdraw based on the incapacity of one individual lawyer

In its Opinion, the appellate court characterizes appellant's challenge to the trial court's order allowing Carlson and the Carlson firm to withdraw as her attorneys of record as a claim that the trial court was required to "specifically enforce her contract with Carlson." (Appendix, p. 1.6.) Based on this premise, and in reliance on Agnew v. Parks (1963) 219 Cal.App.2d 696, the appellate court held that appellant was not entitled to "litigate her contractual rights against Carlson on

Carlson's motion to be relieved as counsel." (Appendix, p. 1.6.) The court misunderstood appellant's argument. In response to the motion to withdraw, plaintiff did not seek to "litigate" her contractual rights against Carlson. Rather, she sought to point out to the court that the person who was disabled, Jonathan Carlson, was not the same entity who contracted to represent her. The contracting entity and the entity that substituted into the case as her attorney of record, was "the Law Office of Jonathan Carlson." Accordingly, even if the court were to allow Jonathan Carlson, individually, to withdraw, it should not allow that different, non-disabled entity, the Law Office of Jonathan Carlson, to withdraw.

The situation here is fundamentally different from the situation presented in Agnew v. Parks. There, plaintiff contracted with a law firm for representation with the written understanding that a particular prominent attorney in the firm, Melvin Belli, would try the case. After numerous continuances, the court set a trial date for June with the notation, "no further continuances." Mr. Belli advised the plaintiff that he was unavailable to try her case in June but that another counsel associated with his firm and familiar with her case would be available to do so. Plaintiff repeatedly insisted that Mr. Belli try the case, but he continued to insist he was unavailable. When the trial date came, the associated attorney did appear and was prepared to try the case, but the plaintiff refused to proceed with him as her attorney. She was advised that no further continuances would be granted but she nevertheless chose to substitute herself in pro per rather than proceed with the attorney who was prepared to try the case. Her request for an additional continuance was denied, and because she was totally unprepared to go to trial, the case was dismissed.

On appeal the plaintiff argued that she had a right to insist that Mr. Belli honor his contractual obligation to try the case. The appellate court disagreed, holding that "[t]he court is

not bound by a contract between a client and her counsel, nor is it required to adjudicate their contractual rights on a motion for continuance based on counsel's failure to appear." (Agnew, supra, 219 Cal.App.2d at 701.) The appellate court relied on the holding of Agnew to conclude that here, the court was not required to adjudicate the "contractual rights" of the plaintiff and Carlson in his motion to be relieved as counsel. The appellate court misapplied the holding of Agnew.

First, the Agnew case actually supports appellant's position. In Agnew the court implicitly approved of the Belli firm's conduct in providing the plaintiff with substitute counsel when the attorney who had been handling the case was unable to complete the representation. That is all that the appellant here is seeking: an order that the Carlson firm should provide substitute counsel to represent her if the attorney who had been handling the case could not complete the representation.

Moreover, in Agnew, the plaintiff asserted that she had a right to enforce the contractual provision that Belli try the case. Here, in contrast, plaintiff is not seeking to enforce the contract; rather, she is seeking acknowledgment by the court that the disabled party and the contracting party are two different entities. (Indeed, the motion to withdraw actually sought the withdrawal of two different entities: Jonathan Carlson the individual AND the Law Office of Jonathan Carlson, yet the reasons given for the withdrawal had only to do with the individual. (AA 10-12).) Thus, even assuming that the court was within its discretion in allowing the withdrawal of Carlson the individual, it plainly should not have allowed the withdrawal of the Carlson firm.

This contention would be a "no-brainer" if the Carlson firm were a large firm. If the firm involved were a multi-attorney firm, there could be no serious contention that the incapacity of a single lawyer would give cause for the

withdrawal of the entire firm and such an order would clearly constitute an abuse discretion. The question, then, is why should this situation, in which the firm is a one-man firm, be any different? The answer, as a matter of policy, due process and fundamental fairness, is that it should not be any different.

CONCLUSION

For all the foregoing reasons, this Court is respectfully requested to grant certiorari in this case.

Respectfully submitted,

DATED: ,

Janice R. Mazur
Counsel of Record
William E. Mazur, Jr.
MAZUR & MAZUR

COURT OF APPEAL
FIFTH APPELLATE DISTRICT
FILED
NOV 3 2004
KAY FRAUENHOLTZ
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By_____
Deputy

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MITSUE TAKAHASHI, F043912 & F044464

Plaintiff and Appellant, (Super. Ct. No. 144048)

v.

LAW OFFICE OF BRIAN K. ROSS, **OPINION**

Defendant and Respondent.

APPEAL from a judgment of the Superior Court of Merced County. Frank Dougherty, Judge.

Mitsue Takahashi, in pro.per., Mazur & Mazur and

Janice R. Mazur for Plaintiff and Appellant. No appearance for Defendant and Respondent.

These are appeals from a final judgment dismissing appellant's claims against respondent. (Appellant filed two notices of appeal, one premature and one timely. We consolidated the appeals.) We will reserve the judgment.

Facts and Procedural History

In 2000, appellant Mitsue Takahashi (appellant) sued respondent Law Offices of Brian K. Ross (respondent) for breach of contract, professional negligence, and related causes of action. The complaint was filed by appellant's attorney Jonathan A. Carlson and the Law Office of Jonathan A. Carlson (sometimes referred to collectively as Carlson). Carlson represented appellant pursuant to a fee agreement prepared by Carlson providing that he would represent appellant in the present case through trial and any appeals and writs to be filed to appellant courts. The agreement provided for periodic billing at an hourly rate and stated: "For purposes of this the agreement and the scope of services set forth herein, all fees, costs and other charges shall not exceed the sum of $25,000.00."

As the case proceeded, Carlson billed appellant and she paid the full $25,000 fee. About two months before the case was scheduled to go to trial on April 22, 2003, Carlson noticed a motion to be relieved as counsel, asserting a medical condition that required him to "significantly reduce my work hours each day. Because of this, I cannot continue to represent plaintiff in this matter with the restrictions under which I have been placed."

The trial court conducted a hearing on the matter in

chambers and without a court reporter.[1] The court granted Carlson's motion to be relieved as counsel by minute order dated February 20, 2003. Appellant filed a notice of appeal and, somewhat later, the petition for writ of mandate and supersedeas in this court seeking to overturn the trial court's order. We summarily denied the petition. Our order noted that appellant retains "the remedy of moving for a continuance prior to the commencement of trial." The appeal (F042673) was dismissed as abandoned by order filed September 3, 2003.

When the matter was called for trial on April 22, 2003, appellant requested a continuance. The court granted a continuance and reset the trial date for June 17, 2003. The court stated: "And the minute order will reflect that the plaintiff is to have an attorney and be prepared to go with that attorney or be prepared to go herself as representing herself on that date ..." At the April 22 hearing, in the course of reviewing an offer to settle the case, respondent advised the court that the expert witness designated by Carlson in discovery had contacted respondent to state that he had not, in fact, been retained and was not participating in the case.

On June 17, 2003, appellant appeared for trial without an attorney. She insisted she "had a contract" with Carlson and "relied on him to be here, or somebody from his law firm." Apparently the matter was transferred to another department and, in proceedings not a part of our record, continued until August 5, 2003.

On August 5, 2003, the parties again appeared for trial. Appellant again requested a continuance. She said her appeal of the order relieving Carlson was still pending and she was

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1 We directed appellant to obtain a settled statement of the in-chambers hearing. She did so and the trial court filed its settled statement on September 21, 2004.

unable to obtain other counsel because "there is a binding enforceable contract [with Carlson] under litigation." The court denied the request for continuance.

The court then asked appellant if she was ready to proceed. She answered, "I guess I'm ready if I have to." The court asked if she had witnesses available. She said, "No, I have none." The court asked appellant whether she was going to testify on her own behalf. Appellant did not answer that question, but stated, "I did subpoena Mr. Carson, but he has not replied." (Although not completely clear from the reporter's transcript, it appears this may have been a continuation of appellant's response that she had no witnesses rather than a response to the court's question about testifying on her own behalf.)

Respondent again informed the court that appellant had no expert witness. In addition, respondent inquired whether appellant had paid the necessary jury fees. She said she did not know. The court directed the clerk to determine whether fees had been posted. Subsequently, the clerk reported fees had not been paid.

The court questioned appellant further about an expert witness. Appellant said Carlson had sent her a copy of an agreement retaining the expert and she had not done anything further. She added, "I don't know how things are done." After other discussion, the court stated: One of the key jury instructions that I will be giving to the jury in this case is BAJI 6.37.4 which reads 'You must determine the standard of professional learning, skill and care required of the defendant only from the opinions of' and there's a blank, 'who have testified as expert witnesses as to such a standard.' [¶]... [Y]ou indicated that you have no such expert available to testify, is that correct?" Appellant reiterated that Carlson had provided her a copy of an expert retainer agreement but she had no direct

contact with the expert.

The court then dismissed the action.

On September 10, 2003, appellant filed a notice of appeal from the August 5, 2003, order (F0439120

On October 16, 2003, the trial court filed a formal order dismissing appellant's action. On October 24, 2003, appellant attempted to file a notice of intention to move for new trial. With the motion, appellant submitted a copy of a receipt for jury fees paid previously by Carlson. In addition, she contended the trial court had erred in relieving Carlson, that Carlson had defrauded her in representing he had retained an expert, and that she did not need an expert on some of her causes of action. The court declined to entertain the motion for new trial on the basis there had not been a trial.

On November 3, 2003, appellant filed a motion for reconsideration of the dismissal order and the order rejecting the motion for new trial. She noticed the motion for hearing on January 6, 2004. On November 3, 2003, this court issued a remittitur in F042673, appellant's abandoned interlocutory appeal filed in conjunction with her petition for writ of mandate and supersedeas. In response to the remittitur and on its own motion, the trial court vacated the January 6, 2004, hearing date.

Appellant filed a notice of appeal from the October 16, 2003, order of dismissal and all subsequent orders. (F044464.) We granted appellant's motion to consolidate the appeals in F043912 and F044464.

Discussion

Despite the complex procedural history of this case, the issues on appeal are relatively straightforward. First, did the trial court abuse its discretion in permitting Carlson to withdraw from the case? Second, did the court prejudicially err in

dismissing appellant's complaint?

A. Permitting Carlson to Withdraw

Although appellant phrases her argument in several different ways, in essence she contends the court was required as a matter of due process and public policy to specifically enforce her contract with Carlson. She says that even if Carlson, personally, was unable to conduct the trial (a fact that she also disputes), his firm should have been required to provided other counsel for her under the terms of the fully paid contract.

The issue before us is narrow. It is not whether Carlson breached his employment contract. It is not whether Carlson misrepresented that he had retained an expert and was ready for trial when he had not and was not. The issue is whether appellant was entitled to litigate her contractual rights against Carlson on Carlson's motion to be relieved as counsel.

In *Agnew v. Parks* (1963) 219 Cal.App.2d 696, plaintiff had contracted for representation by a law firm; the contract provided that the matter would be tried personally by a well-known partner of the firm. That attorney failed to appear for trial instead sending a junior member of the firm. (*Id.* At pp. 698-699.) Plaintiff sought a continuance on the basis she had a contractual right to representation by the named attorney. The court denied the continuance, and the appellate court affirmed the trial court's action: "The court is not bound by a contract between a client and her counsel, nor is it required to adjudicate their contractual rights on a motion for continuance based on counsel's failure to appear. Although a party is ordinarily entitled to counsel of his choice for the trial of his case, plaintiff here was not entitled to [enforce the contract with her attorney] at the expense and inconvenience of other parties to the action regardless of her contract arrangement with [the named

attorney]." (*Id.* At p. 701.)

In the present case, the court accepted Carlson's representation that his medical condition prevented him from conducting the trial on appellant's behalf. Appellant has cited no authority for the proposition that a trial court has the power to compel an attorney to try a case despite a debilitating medical condition, much less that a trial court abuses its discretion in failing to do so. (See generally 11 Witkin, Summary of Cal. Law (9th ed. 1990) Equity, § 59, p. 736 [personal service contracts generally not specifically enforced].)

Appellant says she had paid the full fee required by the contract and that if he was unable to perform, Carlson had an obligation to obtain another attorney, at his expense, to fulfill his obligations under the contract. Even granting the premise (and without deciding whether it is correct), Carlson's failure to do so can be fully addressed as a matter of damages in a separate action against Carlson.

Similarly, appellant says the court did not require sufficient proof from Carlson that his medical condition either existed or was sufficient to prevent him from trying the present case. The court accepted the representations of an attorney as an officer of the court, as it was entitled to do in the absence of conflicting evidence. (See *Leversen v. Superior Court* (1983) 34 Cal.3d 530, 537-538.) This acceptance of counsel's representation concerning the medical restrictions on his practice of law was for the purpose of deciding the motion to be relieved as counsel; it finally adjudicated neither the truth of counsel's representation to the court nor the impact of the medical condition on Carlson's duty to appellant under the contract. Counsel's representation did, however, constitute a sufficient basis for the trial court 's exercise of its discretion (*Mandell v. Superior Court* (1977) 67 Cal.App.3d 1, 4) to permit withdrawal, and we conclude the court did not abuse its

discretion in relieving Carlson as counsel.

In the present case, counsel filed his motion well before the scheduled trial date. When appellant was unable to obtain other counsel by that date, the trial court properly granted a continuance for appellant to obtain other counsel. (See *Thomson v. Thornton* (1871) 41 Cal. 626, 629; *Vann v. Shilleh* (1975) 54 Cal.App.3d 192, 197.) As with the underlying issue of Carlson's claim of disability, the issues of appellant's inability to find substitute counsel and of her inability to prepare for trial on her own may well be important issues in any action of appellant against Carlson for professional negligence and breach of contract. (Cf. *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 915-916.) Those issues could not, however, freeze the present case in an indefinite limbo while the issues resolved themselves. (See generally 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, §§ 8-14, p. 34-42) After the court determined appellant would not be able to proceed to trial represented by Carlson, the interests of the administration of justice and the rights of the opposing party required the court to reschedule the matter in a timely way, and the court did so.

B. The Motions for New Trial and for Reconsideration

Appellant contends the court impermissibly refused to conduct hearings on her motions for new trial and for reconsideration of the order dismissing her action. She contends this refusal was prejudicial because the motions would have been granted if they had been heard.

We are troubled by the court's actions in refusing to consider the new trial motion and summarily denying the motion for reconsideration. It does not appear from the record that the court followed the required procedures in denying these motions. More important, however, we believe the court erred

in dismissing appellant's case when the matter was called for trial on August 5, 2003.

We appreciate the trial court's frustration in this matter. In large part, appellant was unwilling to accept the trial court's order permitting Carlson to withdraw; every step appellant took toward trial was prefaced with an attempt to have the court reconsider that ruling. As discussed above, the court did not abuse its discretion in permitting Carlson to withdraw, and the court granted substantial continuances so that appellant could obtain new counsel or prepare for trial herself. Further, appellant knew, beginning in April 2003, that Carlson had not obtained an expert witness on her behalf and that she must be prepared for trial when the matter was next called.

When the case was called for trial on August 5, 2003, it appears appellant was largely unprepared for trial. She still did not have an expert witness and she had no other witnesses. She continued to insist that Carlson should be required to represent her or provide substitute counsel, and that he was responsible for retaining the expert.

Still, when the court pressed appellant, she declared she was ready to proceed it she "had to." Even if the jury fee had not been paid,[2] the court should have proceeded to a trial to the court sitting without a jury. The court did not do so. Nor did the court determine whether appellant was prepared to and desired to proceed to trial based upon her own testimony: When the court asked if appellant was prepared to testify, she did not give a responsive answer and the court did not renew its question. The court did not have a fully informed basis for concluding appellant was unable to proceed on at least the

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[2] We grant appellant's request for judicial notice of the corrected register of actions, indicating through interlineations that the jury fee had been paid.

contract count.

Further, appellant's cause of action for breach of contract could, in theory, have been proved without an expert witness. Appellant's complaint alleged she contracted with respondent for representation, not that his representation was below professional standards. (In previous proceedings on respondent's motion for summary judgment, respondent acknowledged he stopped working for appellant, but asserted she had stopped paying his bills.)

We are mindful that a litigant appearing in propria persona is expected to follow the rules of procedure and evidence in the same manner as if she were represented by counsel. (See *Taylor v. Bell* (21 Cal.App.3d 1002, 1008-1009.) But the present dismissal was not imposed, for example, after a properly noticed motion by respondent, as a sanction for appellant's procedural errors. Dismissal was granted either because the court did not recognize appellant had at least one cause of action that did not require an expert witness or because the court believed, without foundation, that appellant was unable to proceed to trial with herself as her only witness. Accordingly, the court abused its discretion in dismissing the entire action.

Disposition

The judgment is reversed. Appellant is awarded costs on appeal.

s/ Vartabedian

VARTABEDIAN, Acting P.J.

WE CONCUR.

s/ Harris

HARRIS, J.

s/Wiseman

WISEMAN, J.

COURT OF APPEAL
FIFTH APPELLATE DISTRICT
FILED
NOV 23 2004
KAY FRAUENHOLTZ
CLERK/ADMINISTRATOR
By_____
Deputy

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MITSUE TAKAHASHI,

Plaintiff and Appellant,

v.

LAW OFFICE OF BRIAN K. ROSS,

Defendant and Respondent.

F043912 & F044464

(Super. Ct. No. 144048)

ORDER DENYING PETITION FOR REHEARING

THE COURT:

Appellant's petition for rehearing in the above entitled matter is denied.

s/ Vartabedian

Vartabedian, Acting P.J.

WE CONCUR.

s/ Harris

HARRIS, J.

s/Wiseman

WISEMAN, J.

1.13

Court of Appeal, Fifth Appellate District - Nos. F043912/F04464

S129914

IN THE SUPREME COURT OF CALIFORNIA

En Banc

MITSUE TAKAHASHI, Plaintiff and Appellant,

v.

LAW OFFICE OF BRIAN K. ROSS, Defendant and Respondent.

Petition for review DENIED.

SUPREME COURT
FILED
FEB 16 2005
Frederick K. Ohirich Clerk

DEPUTY

s/ George

Chief Justice